BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of TracFone Wireless, Inc. Petition for Declaratory Ruling	WC Docket Nos. 09-197, 03-109

COMMENTS OF NEXUS COMMUNICATIONS, INC.

Christopher W. Savage
Danielle Frappier
Adam Shoemaker

Davis Wright Tremaine LLP
1919 Pennsylvania Ave. NW Suite 800
Washington, DC 20006
(202) 973-4200

Counsel to Nexus Communications, Inc.

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SUMMARY

TracFone Wireless, Inc. ("TracFone") has proposed substantial and unwarranted changes in the Commission's rules and policies regarding wireless ETCs under the guise of seeking a declaratory ruling "clarifying" existing rules. The Commission should deny TracFone's petition.

To the extent that TracFone believes that carriers and/or regulators would benefit from revising the Commission's Low Income rules, it should file a petition to initiate a rulemaking. To the extent that it is threatened by the fact that other carriers, like Nexus, have found success in serving the low income population, it should formulate an appropriate response in the marketplace with better service, lower prices, or other improvements. To the extent that it is dissatisfied with the conditions placed on its Eligible Telecommunications Carrier ("ETC") designations though the forbearance process, including its decision to forego Link Up funding, it should seek to modify those conditions. In addition to a variety of legal and procedural shortcomings, including misinterpretations of the governing statutes and regulations, at bottom TracFone's Petition is an inappropriate attempt to change the Commission's rules without following proper rulemaking procedures and is simultaneously an attack against a single competitor through unsubstantiated and illogical claims of non-compliance with the Low Income regulations.

TracFone styles its pleading as a "Petition for Declaratory Ruling," purportedly seeking confirmation of multiple regulatory and statutory requirements. In fact, TracFone is seeking Commission approval for its own erroneous interpretations of these requirements that would introduce new and unnecessarily limited criteria for becoming and operating as an ETC. Specifically, TracFone has asked the Commission to restrictively interpret the phrase "customary

charge" found in the rule governing Link Up funding.[1] Although the language of the Petition is not entirely clear, it seems that TracFone has asked that this phrase be interpreted to require Low Income customers to pay an out-of-pocket fee in order to receive Link Up funding, perhaps all paid in advance of receiving services with no deferral as permitted by Commission rules. Not only would a "pay to play" rule have a perverse economic impact on the Low Income program, and most importantly, on low income consumers, it would also create a new restriction on Link Up funding. In addition to its considerable substantive flaws, consideration of such a significant modification to the rules would only be appropriate in the context of a rulemaking proceeding.

TracFone also seeks to have the Commission add a new requirement to the ETC designation process. The current designation process, created by Congress at 47 U.S.C. § 214(e), is a simple one. An applicant must demonstrate that it will offer the nine supported services using, at least in part, its own facilities, and it must advertise the availability and charges for such services. Nowhere in the statute, the Commission's rules, or any of the orders creating those rules did Congress or the Commission state that this process should include a review of the specific technology used to deliver the services. Nor is there any indication anywhere in the statute, regulations, or Commission orders that the designation is limited to the technology in use at the time the designation is conferred. To the contrary, such a restrictive limitation would be inconsistent with the Commission's policy of keeping its regulations technology neutral and would thwart innovation and improvements to carriers' facilities.

TracFone's request regarding the facilities requirement suffers from the same infirmities. For example, TracFone asks the Commission to "clarify that a carrier may not rely on the fact that it has wireline facilities to meet the facilities requirement for purposes of offering wireless

[1] 47 C.F.R. § 54.411(a)(1).

USF-supported services, . . ."[2] Again, nothing in the relevant statute, regulations, or orders limits the types of technology that ETCs may use to deliver the supported services. The statute and applicable rules are technology neutral. TracFone is seeking to impose a technology-specific limitation on ETCs that would require a change in the Commission rules. This kind of change may only be implemented after a formal rulemaking proceeding that complies with the Administrative Procedure Act ("APA"). If the Commission were to consider such rule changes – which it should not – the APA requires the Commission to provide notice to the industry that it is considering changing rules of general applicability. The Public Notice issued in the context of the present proceeding does not suffice.[3] But putting aside these procedural defects, it is difficult to imagine that the Commission would want to revise the rule in the manner suggested by TracFone, or could justify doing so, given that the statute includes no technology-based limitations and decades of Commission policy have required competitive and technology neutrality generally and in universal service matters in particular.

[2] TracFone Petition at ii (emphasis added).
[3] *Wireline Competition Bureau Seeks Comment on TracFone Petition for Declaratory Ruling on Universal Service Issues,* Public Notice, DA 10-2324 (WCB rel. Dec. 8, 2010) ("Public Notice").

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Nexus is an Eligible Telecommunications Carrier ("ETC") in 20 states, and provides services for which end users receive Low Income funding.[4] Nexus has been a facilities-based, competitive carrier for nearly ten years. Nexus began providing services via wireline technology ,and more recently, due to overwhelming customer demand, has begun utilizing wireless technology as well. Nexus was one of the first entities to recognize the Low Income market segment as a business opportunity, rather than a regulatory burden. It has found success in tailoring its services to the specific needs of low income consumers, such as offering prepaid service packages and more recently, providing services using wireless technology.

Wireless is no longer a luxury but a necessity for many financially challenged families. In a time of high unemployment, access to mobile telecommunications services is of greater importance to low income persons than those in higher income brackets. Low income Americans are more mobile and transient, often balancing multiple jobs and moving more frequently, making mobile wireless the only technology that truly suits their needs in most cases. For example, mobile wireless services are crucial for low income Americans in getting and keeping jobs. Without a wireless phone and accessible voicemail, low income job applicants are at a serious disadvantage in receiving messages from potential employers and arranging for

[4] Nexus uses the term "Low Income" to refer to the umbrella program under which Lifeline and Link Up support are provided to qualifying end users.

interviews. Low income persons spend less time during the day at a fixed location, and even less time at a fixed location with a phone available for their use. Moreover, mobile wireless services are often a literal lifeline for homeless Americans, who depend on these services to stay in touch with their families, arrange appointments for medical care and other essential services.[5] The Low Income program, designed specifically to help these Americans, should not serve as a barrier to the technologies of today, but rather, should facilitate access to greater choice in technology and services.

Nexus has sought to provide competitive choices that truly fit the needs of low income Americans. As low income subscribers have demanded the ability to "cut the cord" from restrictive fixed wireline services, and sought mobile services free from up-front fees, prohibitive credit checks and long term contracts, Nexus created solutions tailored to their needs. TracFone has also chosen to focus on this market segment, but took a different tack by choosing not to invest in its own facilities. Because employing one's own facilities, at least in part, is a statutory requirement to obtain ETC designation, TracFone was obligated to seek forbearance from this requirement, which it received, but only on the condition (among others) that TracFone, forgo Link Up funding. These conditions are embodied in the Commission's order granting forbearance issued in September 2005.[6]

In the 2008-2009 time frame, there was a significant increase in new entrants focusing on meeting the needs of low income consumers. Not surprisingly, given this new competitive pressure, TracFone began to revisit the wisdom of some of the conditions it had accepted as part

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[5] Kevin Graham, *Wireless a Lifeline for Homeless,* St. Petersburg Times, Apr. 9, 2007.

[6] *In Re Federal-State Joint Board on Universal Service, Petition of TracFone Wireless, Inc. For Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(i)*, Order, 20 FCC Rcd 15,095 (FCC rel. Sept. 8, 2005) ("TracFone Forbearance Order") (noting at footnote 17 that TracFone clarified during the comment cycle that it only sought Lifeline funding). *See also In Re Federal-State Joint Board on Universal Service, Petition of TracFone Wireless, Inc. For Forbearance from 47 U.S.C. § 214(e)(1)(A) and 47 C.F.R. § 54.201(i)*, Reply Comments of TracFone Wireless, Inc., CC Docket No. 96-45, WC Docket No. 03-109 (filed Oct. 4, 2004) at 4.

of the forbearance process. For example, TracFone is currently seeking a waiver from the Commission to eliminate the requirement to conduct an annual verification of its customers, and rather, proposes to review a statistically valid sample, which is the standard rule applicable to all ETCs.[7] It is also seeking a waiver of Section 54.403(a)(1) of the Commission's Rules, which would enable it to receive the maximum available Tier One Lifeline support.[8] In addition, TracFone petitioned and obtained a waiver of the condition that it must obtain a certification from each public safety answering point where it provides Lifeline Service. It also sought, but was denied, waiver from the condition that it certify to its full compliance with 911/E911 obligations in its service areas.[9]

TracFone, however, appears to have two regrets about the way in which it launched its ETC business that are particularly difficult to address via the waiver process: its Link Up concession and its decision not to employ its own facilities. TracFone has apparently recognized the significant hurdles and expense involved in revisiting these decisions through a waiver process and has determined—as made clear in its Petition—that it would be easier to try to handicap its competitors, and one competitor in particular, Nexus.[10]

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[7] In April 2009, TracFone sought a modification of the annual verification condition imposed by the TracFone ETC Designation Order. *In Re Federal-State Join Board on Universal Service; TracFone Wireless, Inc.*, Petition for Modification of Annual Verification Condition, CC Docket 96-45 (filed April 27, 2009; pending).

[8] In May 2009, TracFone petitioned for a waiver of Section 54.403(a)(1) of the Commission's rules that would enable it to receive the maximum Tier One Lifeline support. *In Re Federal-State Joint Board on Universal Service, TracFone Wireless, Inc.'s Petition for Waiver of 47 C.F.R. § 54.403(a)(1)*, Petition for Waiver, CC Docket 96-45, (filed April 27, 2009, pending).

[9] In March 2008, TracFone petitioned for, and received, a modification of the PSAP certification requirement. *In Re Federal-State Joint Board on Universal Service, Petition of TracFone Wireless, Inc.*, Order, 24 FCC Rcd 3375, (FCC rel. Mar. 5, 2009). In July 2009, TracFone petitioned the Commission to rescind the state 911/E911 condition imposed by the TracFone ETC Designation Order. The Wireline Competition Bureau denied this request. *In Re Federal-State Joint Board on Universal Service, TracFone Wireless Inc. Petition to Rescind State 911/E911 Condition*, Order, 25 FCC Rcd 4661, (WCB rel. May 3, 2010).

[10] *In Re TracFone Wireless, Inc. Petition for Declaratory Ruling*, Petition for Declaratory Ruling, WC Docket No. 09-197, CC Docket No. 96-45 (filed Dec. 1, 2010) ("Petition"). TracFone's petition is curious in that it is styled a petition for declaratory rulemaking, and yet it singles out one competitor, Nexus, for TracFone's unsubstantiated attacks and claims of waste, fraud and abuse. While TracFone's claims are certainly invalid, the fact is that there are many other ETCs with business approaches similar to Nexus'.

The motivation for TracFone's filing, in other words, appears to be that TracFone's business model is hurting, particularly in that it is finding the lack of Link Up funding – which it agreed to waive – to be a competitive disadvantage. Rather than address the real problem, it is trying to use the regulatory process to impose costs and operational impediments on its competitors. Its Petition is anticompetitive and clearly contrary to sound public policy for many reasons, as is explained in more detail below, and should be denied on those grounds alone. But the Petition also suffers from a fatal procedural defect in that it seeks to change the Commission's rules and interpretations of statutory requirements. The Commission should reject TracFone's proposals on the merits, but, to the extent that the Commission is inclined to consider them at all, it must do so in a separate rulemaking proceeding in order to comply with the APA. TracFone's Petition has not requested a rulemaking proceeding, however, which provides a separate and independent reason to deny the petition in its entirety.[11]

I. TRACFONE SEEKS TO IMPOSE ITS OWN INTERPRETATION OF WHAT CONSTITUTES A "CUSTOMARY CHARGE"

The Commission's Link Up rule provides that:

> the term 'Link Up' shall describe . . . [a] reduction in the carrier's ***customary charge*** for commencing telecommunications service. . .The reduction shall be half of the ***customary charge*** or $30.00, whichever is less.[12]

TracFone's petition states that in order to qualify as a customary charge, the carrier must "impose the full amount" of the charge on its non-Low Income customers or its Low Income customers.[13] Based on the Petition's discussion of Nexus' service activation fee ("SAF"), what TracFone apparently means is that unless a carrier has a substantial number of non-Low Income

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[11] These comments are supported by the attached Declaration of August H. Ankum, Ph.D. and Olesya Denney, Ph.D., QSI Consulting, Inc. (Dec. 23, 2010) ("QSI Declaration"). The QSI Declaration provides economic and policy analysis of TracFone's proposals and how they would impede the accomplishment of the goals of the Low Income universal service program.

[12] 47 C.F.R.§ 54.411(a)(1) (emphasis added).

[13] TracFone petition at 4.

customers, or requires its Low Income customers to pay an out-of-pocket fee, the SAF does not qualify as a customary charge. In TracFone's view, if an ETC concentrates on the same market segment as TracFone, the only way that those customers could qualify for Link Up is if the ETC requires them to an pay out-of-pocket charge.[14] TracFone seems intent on turning the pro-consumer efforts of Nexus and several state public utility commissions to assist low income Americans into an "Catch 22" situation for a small, but successful, competitor.[15] Requiring financially-challenged persons to pay an out-of-pocket SAF in order to qualify for Link Up would severely limit the ability of possibly millions of low income Americans to receive these crucial services, especially during this period of extended economic hardship.

Putting aside the substantive defects and unfairness of TracFone's proposal, it faces a threshold procedural problem: to Nexus' knowledge, the Commission has never interpreted the rule containing the "customary charge" language at all, and certainly not in the restrictive way advocated by TracFone. Restricting the application of Link Up to these specific circumstances would constitute a change in the Commission's rules that would require a rulemaking proceeding under the APA. As stated by the D.C. Circuit, "[i]t is well-established that an agency may not escape the notice and comment requirements. . .by labeling a major substantive legal addition to

[14] Although its Petition is not entirely clear, TracFone may only view an up-front payment in advance of service being provided as qualifying.

[15] TracFone seeks to impinge the reputation of a small competitor by implying that Nexus' offering of Link Up subsidies somehow equates to waste, fraud and abuse. Nexus has consistently demonstrated that it cares about eliminating waste, fraud and abuse from the Low Income program by developing on its own accord an internal best practices policy whereby Lifeline subscribers who do not use their handset for sixty days are de-enrolled. Additionally, Nexus has engaged in extensive outreach efforts, including deploying mobile information centers directly to economically disadvantaged neighborhoods, which was recently recognized by the Federal-State Joint Board on Universal Service. *In Re Federal-State Joint Board on Universal Service; Lifeline and Link Up*, Recommended Decision, 2010 FCC LEXIS 6557, at ¶ 64 (Jt. Bd. rel. Nov. 4, 2010).

a rule a mere interpretation."[16] It has also specifically held that notice and comment are required to give specific meaning to a previously uninterpreted word in an FCC regulation.[17]

To the extent that the term "customary charge" has been interpreted at all, it has been read, at least implicitly, by some states' public utility commissions as permitting a waiver of a portion of the SAF. Specifically, some state commissions have required Low Income-only ETCs to waive the balance of the SAF not covered by Link Up, and in doing so, properly recognized this as a benefit they were securing for consumers that was entirely consistent with the Commission's rules. The industry has also interpreted the phrase as permitting waivers. In fact, many ILECs waive the balance of their SAFs. For example, AT&T appears to waive the balance of the charge that is not covered by Linkup, at least in certain states.[18] Verizon also appears to also waive the balance of the charge not otherwise covered by Linkup for some states.[19] Not only is this standard industry practice, but it actually advances the policy goal of the program of getting discounted telephone services to the poorest Americans.[20]

Moreover, the details of many ETCs' rates, including their SAFs, are contained in tariffs and price lists filed with state public utility commissions. These documents contain the entities' common carrier offerings and constitute the binding prices, terms and conditions of service. As a common carrier, Nexus is required to hold itself out to serve all potential users indifferently, meaning that the prices, terms and conditions contained in its tariffs and price lists must be

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[16] *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. Apr. 14, 2000).

[17] *C.F. Communications Corporation v. FCC*, 128 F.3d 735, 738-39 (D.C. Cir. Oct. 31, 1997) (finding that the fact that the specific word in question "does not have a single fixed meaning. . .does not convert the word into sort of a Rorschach test, permitting the Commission to read into the word anything it pleases.. . . We do not suggest that the Commission could not amend its rules to render [the word] a term of art encompassing [the Commission's preferred meaning]. But to do so, it must use the notice and comment procedure of the Administrative Procedure Act. It may not bypass this procedure by rewriting its rules under the rubric of 'interpretation.'").

[18] See rate section of AT&T's Georgia tariff here http://cpr.bellsouth.com/pdf/ga/a004.

[19] See rate section of Verizon's Georgia tariff here: http://www.verizonwireless.com/pdf/lifeline/LifelineLinkup_Brochure_Georgia.pdf; Verizon's brochure for West Virginia (available online here http://www.verizonwireless.com/pdf/lifeline/LifelineLinkup_Brochure_WestVirginia.pdf).

[20] QSI Declaration at ¶¶ 35-39.

offered to all its customers.[21] These tariffs often specify that if a customer does not qualify for Low Income funding but would nevertheless still like to take service from that carrier, the customer must pay the full SAF. Any restriction to deny Link Up in instances where the ETC waives a portion of the SAF would require changes to state ETC policies, many state tariffs and price lists, as well as the pricing policies of multiple, major ILECs. This would be a change well beyond a simple "clarification."

Procedural defects aside, TracFone's proposed interpretation of the "customary charge" language is a bad idea. It would have the perverse economic effect of requiring Low Income customers that the Commission has determined require subsidies to receive phone service, to pay money out-of-pocket in order to receive the subsidy. There is no valid policy or economic rationale for this proposal. Customers who pay, for example, $40 out-of-pocket toward a $70 SAF, would be eligible to receive $30 in Link Up funding, but if the ETC offered to waive the $40 out-of-pocket, the customer would get zero Link Up. Such a change would force ETCs to require cash-strapped families to "pay to play" and force ETCs to either absorb service initiation costs by shaving their extremely limited margins or forgo providing Lifeline services altogether.[22] Interestingly, one of the initial plans approved by the FCC in the TracFone Forbearance Order was completely subsidized by Lifeline funding.[23] TracFone apparently has no problem when *its* customers pay $0 in out-of-pocket expenses, and only protests when *its competitors* provide similar economic benefits to low income consumers.

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[21] *Virgin Islands Telephone Corp. v. FCC*, 198 F.3d 921, 929 (D.C. Cir. 1999); *National Assoc. of Regulatory Utility Commissioners v. FCC*, 553 F.2d 601, 608 (D.C. Cir. 1976); *In Re Federal-State Joint Board on Universal Service,* Report and Order, 12 FCC Rcd 8776, ¶ 785 (FCC rel. May 8, 1997) ("1997 Universal Service Order").

[22] See further discussion of in the economic effects of TracFone's proposal in QSI Declaration at¶¶ 36-41.

[23] TracFone Order at n.17 (discussing the TracFone "Pay-As-You-Go" plan and nothing that "the cost of this plan would be completely subsidized by the Lifeline support").

TracFone is simply wrong on the merits on this point. No change is needed to the Link Up rule. Low Income funding—unlike High Cost subsidies collected by carriers—flows directly to the benefit of end users. Low income consumers directly benefit from efforts of carriers such as Nexus to waive the balance of SAF not covered by Link Up. TracFone offers no policy or economic support as to why the Commission should suddenly change the Link Up rule. The only discernable reason for its proposal is to impede the legitimate efforts of its competitors, Nexus in particular.[24]

II. THE ETC DESIGNATION PROCESS IS TECHNOLOGY NEUTRAL

Section 214(e) of the federal Communications Act governs the ETC designation process.[25] Specifically, that section provides:[26]

> A State commission shall upon its own motion or upon request ***designate a common carrier that meets the requirements of paragraph (1)*** as an eligible telecommunications carrier for a service area designated by the State commission.

If a common carrier meets the requirements of paragraph (1), federal law mandates that the state commission (or, in some cases, the Commission) "shall" designate the carrier an ETC. ***There is no other qualification attached to this federal statutory command.***

For its part, paragraph (1) provides:[27]

> A common carrier designated as an eligible telecommunications carrier . . . ***shall be eligible to receive universal service support*** in accordance with section 254 of this title and shall, throughout the service area for which the designation is received—

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[24] Nexus notes that the Commission has denied Link Up funding to all subsequent Forbearance applicants. *In re Telecommunications Carriers Eligible for Universal Service Support; Federal-State Joint Board on Universal Service; Conexions Petition for Forbearance;* Order, FCC 10-178 at ¶21 (FCC rel. Oct. 1, 2010); *In re Federal-State Joint Board on Universal Service; Telecommunications Carriers Eligible for Universal Service Support; Federal-State Joint Board on Universal Service; i-wireless, LLC Petition for Forbearance from 47 USC §214(e)(1)(A)*, Order, 25 FCC Rcd 8784 at ¶21 (FCC rel. June 25, 2010); *In re Telecommunications Carriers Eligible for Universal Service Support; Federal-State Joint Board on Universal Service; Head Start Petition for Forbearance; Consumer Cellular Petition for Forbearance; Midwestern Telecommunications Inc. Petition for Forbearance; Line Up, LLC Petition for Forbearance*, Order, 25 FCC Rcd 10510 at ¶21 (FCC rel. July 30, 2010).

[25] 47 U.S.C. § 214(e).

[26] 47 U.S.C. § 214(e)(2) (emphasis added).

[27] 47 U.S.C. § 214(e)(1) (emphasis added).

> ***(A) offer the services that are supported by Federal universal service support mechanisms*** under section 254(c) of this title, either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); ***and***
> ***(B) advertise the availability of such services and the charges therefor*** using media of general distribution.

This paragraph requires only that an ETC applicant demonstrate that it is a common carrier and affirm that it will do two things: offer the supported services over the relevant facilities and advertise the availability and charges for those same services.[28]

Nothing in this passage suggests that the technology an ETC uses to provide its services is relevant in any way. To the contrary, the ETC designation process is entirely focused on ***conferring ETC status on an entity,*** not on the particular technology on which it chooses to base its services. Nothing in the statute makes the technology determinative of, or even relevant to, the designation process. The statute is technology-neutral. FCC regulations confirm this reading. Specifically:[29]

> A state commission shall designate a common carrier that meets the requirements of this section as an eligible telecommunications carrier ***irrespective of the technology used by such carrier***.

This means that an ETC designation ***to an entity*** is sufficient for ***that entity***—the designated ETC—to receive Low Income support ***regardless of the technology used to deliver the supported services***. Again, the designation is as an eligible telecommunications ***carrier,*** not of eligible telecommunications ***services.*** Nothing in the statute or the FCC rules requires (or even permits) a state commission to pass judgment on, or base its decision regarding certification on, the type of technology used to deliver the supported services. Nor are there any limitations on funding for an ETC that introduces new technology to its Low Income customers subsequent to designation. This is true regardless of any "wireless-specific" ETC petitions filed out of

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[28] Nexus has address the facilities requirement in more detail at Section III, *supra*.
[29] 47 C.F.R. § 54.201(h) (emphasis added).

confusion on the part of state commission staff, ETCs, or both.[30] The "issue" of whether any particular ETC's chosen technology originally was, or now is, wireline, wireless or some combination thereof, is a red herring. It simply has no bearing on the continued effectiveness of a designation order finding that the entity fulfills the statutory requirements.

Technological neutrality has been a cornerstone of the Commission's competition policy, which has recognized that "Congress made clear that the 1996 Act is technologically neutral and is designed to ensure competition in all telecommunications markets."[31] The Commission has adhered to this policy in many different contexts, and has acknowledged that it must do so in order to remain "consistent with the overarching goal of the 1996 Act."[32] The industry has

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[30] Most of TracFone's discussion of the ETC designation process is, in fact, a discussion of a separate proceeding involving Nexus in Tennessee, rather than engaging in a discussion of the actual requirements of the federal statute at issue. Without getting into irrelevant details here, suffice it to say that the question in Tennessee had nothing to do with the federal standards for designation as an ETC—which are entirely technology-neutral—but rather with a question of state law.

[31] *Deployment of Wireline Services Offering Advanced Telecommunications Capability; Petition of Bell Atlantic Corporation For Relief from Barriers to Deployment of Advanced Telecommunications Services; Petition of U S WEST Communications, Inc. For Relief from Barriers to Deployment of Advanced Telecommunications Services; Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Technology; Petition of the Alliance for Public Technology Requesting Issuance of Notice of Inquiry and Notice of Proposed Rulemaking to Implement Section 706 of the 1996 Telecommunications Act; Petition of the Association for Local Telecommunications Services (ALTS) for a Declaratory Ruling Establishing Conditions Necessary to Promote Deployment of Advanced Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996; Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell Petition for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act of 1996 and 47 U.S.C. Sec. 160 for ADSL Infrastructure and Service*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd. 24012, 24017 (FCC rel. Aug. 7, 1998) at ¶11. Indeed, in defining the term "telecommunications service," Congress took pains to emphasize that what mattered was the functionality being provided, "regardless of the facilities used." 47 U.S.C. § 153(46).

[32] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, 12 FCC Rcd 87, Recommended Decision (Rel. Nov. 8, 1996); *See also* 1997 Universal Service Order at ¶ 48 ("We concur in the Joint Board's recommendation that the principle of competitive neutrality in this context should include technological neutrality. Technological neutrality will allow the marketplace to direct the advancement of technology and all citizens to benefit from such development. By following the principle of technological neutrality, we will avoid limiting providers of universal service to modes of delivering that service that are obsolete or not cost effective."); *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, 19 FCC Rcd 15676, Notice of Proposed Rulemaking and Declaratory Ruling (FCC rel. August 09, 2004) ("As Law Enforcement requests, we reaffirm that CALEA is technology neutral and thus does encompass services provided using packet-mode technology. The Commission has previously noted that CALEA is technology neutral and that a carrier's choice of technology does not change its obligations under CALEA."); *Rural Broadband Report Published in FCC Record*, GN Docket No. 09-29, 24 FCC Rcd 12791, Public Notice (Rel. October 19, 2009) ("Decision makers therefore should proceed on a technology-neutral basis--by considering the attributes of all potential technologies--in selecting the technology or technologies to be deployed in a particular rural area.")

followed this same path, such that wireless services are increasingly viewed as a substitute for wireline services by many consumers, and increasing numbers of service providers are simultaneously providing the same or similar services using both wireline and wireless technologies.[33] It would be contrary to these industry developments, as well as the Commission's repeated commitment to technology neutrality, to limit or otherwise introduce unnecessary barriers to and expense involved with consumers gaining access to the technologies of today.

Technology neutrality has also been a central tenant of the Commission's universal service policy. In its 1997 Universal Service Order, the Commission established a policy of competitive and technology neutrality as a governing principle of the contribution and distribution aspects of the federal universal service fund. Specifically, the Commission found that the public interest called for a policy of competitive neutrality, defined as:[34]

> COMPETITIVE NEUTRALITY -- Universal service support mechanisms and rules should be competitively neutral. In this context, competitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.

Moreover, to the extent that there is any doubt about the correct interpretation, one need look no further than the FCC's recent affirmation of the technology-neutral policy goals of the Low Income program articulated by the FCC in its National Broadband Plan.[35]

Finally, it is clear that TracFone is proposing that the Commission change its interpretation of this statutory requirement (all tall order given that the statute contains no such limitations and this would be exactly contrary to the policy direction of the Commission since the inception of the Universal Service Fund in 1997). If TracFone seriously wants the

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[33] QSI Declaration at ¶ 49.
[34] 1997 Universal Service Order at ¶ 47.
[35] *See Connecting America: The National Broadband Plan* at 173.

Commission to consider this radical proposal, it should follow proper procedural rules and file a petition to initiate a rulemaking proceeding.

III. THE 214(e)(1) FACILITIES REQUIREMENT IS ALSO TECHNOLOGY NEUTRAL

ETC designation is a state-by-state process that is focused on the services to be provided and the applicant entity. Again, the statute provides:

> (e) Provision of universal service[36]
>
> (1) Eligible telecommunications carriers: A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 of this title and shall, throughout the service area for which the designation is received
>
> > (A) ***offer the services that are supported*** by Federal universal service support mechanisms under section 254(c) of this title, ***either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier)***; and
> > (B) advertise the availability of such services and the charges therefor using media of general distribution.

Otherwise stated, the statute requires applicants to show that they will use their own facilities, at least in part, to offer at least one of the supported services listed at 54.101(a) of the Commission's rules.[37] It also requires the entity to show that it will properly advertise the services and the rates. In seeking to move beyond these obligations, TracFone is simply creating new requirements out of whole cloth.

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[36] 214 U.S.C. § 214(e)(1) (emphasis added).

[37] 47 C.F.R. § 54.101(a). Given that ETC designations are granted on a state-by-state basis, there may even be an implicit basis in the statute for a particular state public utility commission to seek assurances regarding the facilities requirement with respect to consumers in that particular state. Nexus' experience in applying for its own ETC designations is that state public utility commissions do, in fact, require a demonstration that the carrier fulfills the statutory facilities requirement with respect to consumers in the state for which the designation is sought. The literal wording of the statute is, in fact, quite broad, and would seem to permit a more expansive view of the facilities requirement.

In its Petition, TracFone seeks to impose new requirements on ETC applicants that have no basis in the statute or the Commission's orders, and tries to disguise them as requests for "clarification." Not only would TracFone have the same entity apply twice for ETC designation to provide the same supported services (see Section II of its Petition, addressed in Section II of these comments), it also seeks to add a layer of technology-specific limitations on the analysis of what facilities the entity seeking ETC designation is required to have.

Although it is not entirely clear from the Petition, it appears that TracFone would require state commissions to conduct duplicative analyses of an ETC's satisfaction of the facilities requirement, treating wireline facilities separate from wireless facilities. There is, however, no basis in the statute for such a proposal—the statute is absolutely silent on the technology employed to provide the supported services. Nexus agrees that if a carrier is a pure reseller, with no facilities of its own providing any of the nine supported services, the Commission's 1997 Universal Service Order makes it clear—consistent with the plain language of the statute—that the carrier would need to seek forbearance. However, a possible implication of TracFone's request for "clarification" is that a carrier using facilities for both wireline and wireless services may face barriers to entry into the ETC market because it would have to make a showing of separate facilities for its wireless services.[38]

Whether the prospective ETC employs wireline technology, wireless technology, or some combination thereof is of no consequence.[39] The relevant inquiry for a regulatory agency

[38] See discussion of competitive and technology neutrality policy at the Commission generally and in universal service matters in particular, *supra*, Section II; *see also* QSI Declaration at ¶ 46-49.

[39] In fact, the difference between the two is not as sharp as TracFone would appear to believe. For example, other than the wireless "loop" connection to the customer, wireless carriers use "wireline" facilities to carry their backhaul traffic. As cells proliferate and cell sites become smaller in order to provide adequate service to a greater and greater number of customers, moreover, the relative balance of "wired" versus "wireline" carriage even in a traditional cellular network shifts ever more heavily to the "wired" side.

considering whether to grant ETC status is whether the carrier provides one or more of the supported services, at least in part, over its own facilities, regardless of technology.

The Commission got it right in the 1997 Universal Service Order when it found that new ETC entrants should not be required to invest in the most expensive and most extensive level of facilities. In fact, the Commission purposefully barred only those carriers who use none of their facilities, and it permitted ETCs to rely on leased unbundled network elements to fulfill this obligation.[40] It also steadfastly refused to define a limited set of network elements that would satisfy the facilities requirement, fearing that such a limitation would create substantial barriers to entry. The only real line drawn in the sand on this issue is that a carrier must do more than purchase a wholesale service from a facilities-based provider and resell that service to the customer.[41] This approach is consistent with the Commission's general strategy regarding the development of facilities-based networks in general. Specifically, the Commission has historically recognized that even very substantial reliance on resold network elements was nevertheless a step into facilities-based service. Such an approach is particularly appropriate for an ETC that concentrates on serving consumers qualifying for Low Income support, given that it would likely be the rare case where building an entirely separate network for this specific market segment would be economically justified.

The fact that the Commission refused to define a specific level of facilities is explained quite clearly in its Order:[42]

> we conclude that the definition of 'facilities' that we adopt will serve the goals of universal service and competitive neutrality ***to the extent that it does not dictate the specific facilities that a carrier must provide or, by implication, the entry strategy a carrier must use and, therefore, will not unduly restrict the class of carriers that may be designated as eligible***.

[40] 1997 Universal Service Order at ¶ 178.
[41] *Id.* at ¶ 178.
[42] *Id.* at ¶ 153 (emphasis added); see also QSI Declaration at Part III.

In other words, the Commission's pro competitive and technology-neutral goals were paramount in its analysis of the facilities requirement.[43] Those goals should not be distorted to suit the anti-competitive griping of one entity that has regrets about the way its regulatory strategy has unfolded.

IV. CONCLUSION

Based on the foregoing, Nexus respectfully requests that the Commission deny TracFone's requests. To the extent the Commission wishes to consider in the future any of TracFone's requests, it should instruct TracFone to file a proper petition for rulemaking in compliance with the APA, although as Nexus has clearly demonstrated above, the new rules being advocated by TracFone would distort competition and only serve to harm low income consumers.

Respectfully submitted,

Christopher W. Savage
Danielle Frappier
Adam Shoemaker

Davis Wright Tremaine LLP
1919 Pennsylvania Ave. NW Suite 800
Washington, DC 20006
(202) 973-4200

Counsel to Nexus Communications, Inc.

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[43] As explained in the QSI Declaration, this approach to the "facilities" requirement of Section 214(e)(1) is entirely consistent with the Commission's more general policies regarding encouraging the development of competitive entry in local exchange markets in general. *See* QSI Declaration at Part III.